U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 January 2007

BALCA Case No.: 2005-INA-00205
ETA Case No.: P2003-CA-09542200/JS

In the Matter of:

ELIZABETH MARY ANN SMITH,
Employer,

on behalf of

CARMEN ROSA MARTINEZ SOTO,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Elizabeth Mary Ann Smith
Pro Se for the Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 13, 2001, Employer, Elizabeth Mary Ann Smith, filed an application for labor certification to enable the Alien, Carmen Martinez, to fill the position of Homecare Companion. (AF 21). Eight years of grade school and four years of high school were required. No experience was necessary.

The State of California Employment Development Department ("EDD") forwarded information regarding a total of twenty-one applicants to Employer. (AF 28). On January 7, 2003, Employer provided her recruitment results. (AF 25).

On April 19, 2005, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the basis of the rejection of U.S. workers for other than lawful, job-related reasons. (AF 16). The CO found that Employer's stated reasons for rejecting fourteen of the applicants were not satisfactory. With respect to those applicants, and the CO's findings, Employer had claimed that she left messages with a family member for U.S. applicants 1 and 2, but did not get a call back in both cases. The CO explained that he was unsure whether the applicants received the messages or if the information relayed was sufficiently clear. Applicants 3, 4 and 5 were rejected after Employer left messages on their respective answering machines and the applicants did not return the calls. The CO pointed out that Employer did not provide the content of the messages left and it was not certain that the messages were received, leading to the conclusion that leaving one message was not enough.

Applicants 6 and 7 were rejected because there was no answer when the Employer called them and Applicant 8 was rejected because the person who answered her telephone had a bad attitude. With regard to Applicant 8, the CO found no evidence that the individual who answered was the applicant or that the applicant had anything objectively wrong with her attitude. Applicants 9 and 10 were rejected because the

telephone number dialed for each was a wrong number, it not being clear whether Employer misdialed or whether these applicants provided wrong telephone numbers. The CO found that one attempted telephone call to a wrong number was not considered a sufficient attempt to recruit. U.S. applicants 11 and 12 were rejected because they failed to reply to Employer's messages, although Employer did not indicate how the messages were left or with whom. Applicant 13 was rejected because her experience was mostly in other areas. The CO noted, however, that the position required no experience. Applicant 14 came for an interview but was rejected for "no answers after that." The CO found this to be an insufficient explanation of what happened or of any effort on the part of Employer to follow-up with this applicant.

The CO pointed out that each applicant provided an address and noted that Employer could have made more vigorous attempts to reach them by phone and/or could have written to them. Employer was directed that rebuttal needed to detail how each of the U.S. workers named was recruited in good faith. If Employer intended to assert in rebuttal that any additional contacts were made, Employer needed to provide convincing documentation. By way of example, the CO listed telephone bills as documentation Employer might produce in support of rebuttal.

Employer submitted rebuttal on May 4, 2005. (AF 9). According to Employer, she left messages with family members of Applicants 1 and 2, who verified that the messages were given to the applicants the first time they were called. This is why no second attempt was made. Applicants 3-5 had three very clear job offer messages left for them. Employer implies that three attempts were made to contact Applicants 6 and 7, asserting that there was no information from the CO on how many times she had to call applicants. With regard to Applicant 8, Employer asserted that if an applicant has a bad attitude on the telephone, she has a right to reject that applicant. Employer claims she made three attempts to contact Applicants 9 and 10, she had no forwarding number and having received a wrong telephone number, "of course, I'm not going to keep trying, why did he/she gave[sic] me a wrong number to start with."

Employer provided the first names of the individuals with whom messages were left for Applicants 11 and 12 and the content of the message. When Applicant 13 was interviewed, she mentioned that she was not interested in the job being offered and Applicant 14 advised Employer that she would get back in touch after being interviewed. When she did not, Employer attempted to telephone her and the applicant did not answer, so Employer assumed she was not happy with what Employer was offering.

A Final Determination was issued on June 16, 2005. (AF 7). The CO found that Employer had failed to provide convincing information to show, with regard to the applicants for whom messages were left, that Employer made sufficient attempts to contact these applicants. The CO determined that a message left with a third party may not have been received by the applicant and that Employer could have written these applicants. Regarding Applicant 8, the CO pointed out that Employer failed to provide any objective information to substantiate the allegation regarding this applicant's bad attitude or to provide any information whatsoever about the actual conversation had with the applicant. Employer also failed, according to the CO, to document the telephone number dialed for the applicants for whom Employer claimed she had a wrong telephone number, and if the number was wrong or not in service, Employer could have written to them. The CO found with regard to Applicant 13 that Employer had initially stated that she found this applicant's experience to have been primarily in other fields; yet in rebuttal she claimed that the applicant had indicated she was not interested in the position. The CO found that this statement did not show convincingly that the applicant would have turned down the job if it had been offered to her.

Employer submitted a Request for Review and Reconsideration by letter dated July 12, 2005. (AF 1). The CO denied the request for reconsideration on August 23, 2005 and this matter was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). (AF 6).

DISCUSSION

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§656.1, 656.2(b). Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Exxon Chemical Company*, 1987-INA-615 (July 18, 1988) (*en banc*). An employer cannot lawfully reject an applicant who meets the minimum requirements but fails to meet an undisclosed requirement. *Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991)(*en banc*). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*).

In *Bay Area Women's Resource Center*, 1988-INA-379 (May 26, 1989) (*en banc*), it was held that where an employer only attempted to contact a U.S. applicant at one of three possible telephone numbers and no attempt was made to contact her by mail, the employer's two messages did not constitute reasonable efforts to contact a qualified U.S. worker. The instant case is no different. With regard to U.S. applicants 9 and 10, in her initial recruitment report Employer claims she tried to telephone them, but the telephone number was wrong. (AF 26). That report does not indicate numerous attempts to make telephone contact with these two applicants. It does, however, list telephone numbers for both of the applicants which are incorrect, the numbers as listed on the applicants' respective resumes having been inverted by Employer. Therefore, Employer did have the wrong telephone number, a mistake of her own making. It was incumbent upon her, after failing to reach these applicants by telephone, to attempt other means of contact, such as a letter. *See Bay Area Women's Resource Center, supra.*

Employer has demonstrated less than a good faith effort to contact these two qualified U.S. applicants, rendering it unnecessary to examine the stated reasons for the rejection of the other twelve applicants. Labor certification was properly denied, and the remaining issues need not be addressed.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.